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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

AERONAUTICAL RADIO, INC., *Petitioner*

v.

NATIONAL MEDIATION BOARD, ET AL., and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Aeronautical Radio, Inc. ("ARINC") prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on June 2, 1967, in a consolidated appeal including Case No. 20,128, *Aeronautical Radio, Inc.* v. *National Mediation Board, et al.* and Case No. 20,251, *International Brotherhood of Teamsters* v. *Aeronautical Radio, Inc.*, respectively affirming the District Court's dismissal of ARINC's complaint and reversing the District Court's

denial of summary judgment on respondent Teamsters' counterclaim.

OPINIONS BELOW

The opinion of the Court of Appeals, appearing in Appendix A to this petition, is not yet reported. The order of the District Court dismissing ARINC's complaint (Appendix B, *infra*) is not reported. The opinion of the District Court on the denial of summary judgment for the Teamsters is reported at 255 F. Supp. 466. That opinion and the order denying summary judgment are reproduced in Appendix C, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1967 (Appendix D, *infra*). Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does the Railway Labor Act impose obligations upon an employer to bargain collectively where, as a result of a National Mediation Board representation election in which all employees expressed a choice, a union was certified although it received votes from less than a majority of the craft or class and from less than those who chose "no representation"?

2. Is the federal judiciary without jurisdiction to grant direct relief requested by an employer against the National Mediation Board which has certified the union on the basis of the evidence described above?

3. Must a court of equity enforce the Certification of the National Mediation Board issued on the evidentiary basis described above by issuing a mandatory injunction compelling the employer to bargain?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Involved are the Fifth Amendment to the United States Constitution; Section 2 (Fourth, Eighth and Ninth) of the Railway Labor Act, 45 U.S.C. § 152, Fourth, Eighth and Ninth; and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 703. These provisions are reproduced in Appendix E, *infra*.

STATEMENT

ARINC is a communications company providing safety and operational air-ground communications to the nation's airlines and others through approximately 1250 ground radio stations in all 50 states, Puerto Rico and Okinawa.

In December 1964, the International Brotherhood of Teamsters ("Teamsters") invoked the services of the National Mediation Board under the Railway Labor Act and sought to be certified as the authorized representative of the 400-man craft or class of ARINC's radio and teletype operators, maintenance men and equipment technicians. The Air Line Dispatchers Association ("ALDA") also sought to represent these employees.

The Railway Labor Act provides that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class . . ."* It also requires the National Mediation Board "to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives . . . ."**

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* Section 2, Fourth, 45 U.S.C. § 152, Fourth.

** Section 2, Ninth, 45 U.S.C. § 152, Ninth.

Pursuant thereto, the Board conducted a secret ballot election among the 400 employees to ascertain who, if anyone, the majority desired as the craft's agent for collective representation.

All parties and the Court of Appeals agree that out of the 400 eligible voters the count was 179 (the largest group) for "no union", 147 for the Teamsters and 74 for ALDA.* Notwithstanding, the Board issued a Certification designating the Teamsters as the bargaining representative for the 400-man craft or class (R. 16).** No explanation was given as to how the choice of only 147 out of 400 employees could constitute the organization which the majority of the craft or class desired. Nor was any other evidence ever adduced before or cited by the Board as a basis for such a conclusion.

When its request to the Board for reconsideration was denied, ARINC filed a suit in the District Court attacking the validity, under the Constitution and the Railway Labor Act, of the Board's action in issuing the Certification on the basis of the evidence then of record (R. 3). Federal jurisdiction was based on 28 U.S.C. §§ 1331, 1332, 1337, 2201, and 2202; 5 U.S.C. § 703 and D.C. Code § 11-521 (1961 ed. Supp. IV.).

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* The Mediation Board election ballot provides no way for an employee to affirmatively indicate a desire not to be represented by a union, thus an employee who fails to vote or casts a void ballot is "treated as having voted for no representation" *Railway Clerks v. Employees Association*, 380 U.S. 650, 670-71 (1965). Accordingly, in the instant election all parties and the Court of Appeals agreed that 179 employees have voted for "no union". Opinion of Court of Appeals, June 2, 1967, *infra*, pp. 2a-3a.

** "R. —" refers to the Consolidated Joint Appendix in the Court of Appeals, of which a certified and nine additional copies are filed with this petition.

On the Board's motion, the court dismissed the complaint on the grounds that it lacked "jurisdiction over the subject matter".* An appeal to the United States Court of Appeals for the District of Columbia Circuit (Appeal No. 20,128) followed.

In the District Court the Teamsters, who had previously intervened as defendants, moved for summary judgment on a counterclaim seeking a mandatory injunction based on the Certification, compelling ARINC to recognize and bargain with them as the representative of the craft or class. In opposition, ARINC argued, *inter alia,* that the NMB's Certification was invalid. The Teamsters' motion was denied by another judge of the District Court, who held that "The Supreme Court in the Switchmen's case [320 U.S. 297] expressly left open the question what a Court of Equity may consider when its affirmative help is asked for a decree to enforce the certificate of the Mediation Board and require the employer to bargain collectively with the Union so certified . . . . ," and, with respect to this case, "that the strong arm of equity should not be exerted in order to compel the employer to bargain collectively with the union having a plurality of votes when by far the greater number of employees voted for no union at all."** The Teamsters' appeal from that decision (Appeal No. 20,251) was subsequently consolidated by the Court of Appeals with Appeal No. 20,128.

On June 2, 1967, the Court of Appeals affirmed the District Court's dismissal of ARINC's complaint and reversed the denial of the Teamsters' motion for sum-

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* *Infra,* p. 6a.

** *Infra,* pp. 9a, 10a.

mary judgment. The Court held, *inter alia,* that it was a "permissible conclusion" of the National Mediation Board "that since a majority of the employees obviously had voted for *some* representation, the union which became the choice of a majority of those thus voting should be certified." *

REASONS FOR GRANTING THE WRIT

This case presents questions fundamental to the administration of the Railway Labor Act which will continue to plague the National Mediation Board, and the federal courts, until answered by this Court. As detailed below, they entail the resolution of basic conflicts between the principles enunciated by this Court in *Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937) and in *Railway Clerks* v. *Employees Association,* 380 U.S. 650 (1965), and the action of the Mediation Board and the Court of Appeals in the instant case.

Also posed are significant questions as to the jurisdiction of the federal judiciary (1) when it is asked for relief by an employer who is aggrieved as a result of unauthorized or arbitrary action by the Mediation Board and (2) when, in defense against requested judicial enforcement of the Railway Labor Act's obligation to bargain, an employer challenges the legality of the Mediation Board's action upon which the claim for enforcement is based.

I.

Section 2, Ninth of the Railway Labor Act places a duty on the National Mediation Board to conduct an

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* *Infra,* p. 4a.

investigation by secret ballot or "any other appropriate method" to ascertain the desires of the majority of the craft or class as to who, if anyone, is to be the collective bargaining representative of the class.

The Act, through Sections 2, Fourth and Ninth, also imposes statutory obligations on an employer to bargain with the representative certified by the Mediation Board as being desired by a majority of the craft or class and prohibits bargaining with any other representative.

On the other hand, "If the majority of a craft or class has not selected a representative . . ." these obligations do not arise, and the "carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions." *Virginian Ry. Co.* v. *System Federation, No. 40,* 300 U.S. 515, 548 n. 6 (1937).

The Mediation Board has at times certified a union which has received the written ballots of *less* than the majority of the craft or class (where the majority has voted for *some* union). This practice was squared with the "majority of any craft or class" requirements of Section 2, Fourth by this Court by applying the presumption that those who did not actually cast ballots could be presumed to assent to be bound by the will of the majority of those who did. *Virginian Ry. Co.* v. *System Federation No. 40 supra,* at 560.

However, in 1965, in *Railway Clerks* v. *Employees Association,* 380 U.S. 650, this Court rejected a pre-election challenge to an NMB ballot which provided no place for an employee to vote for "no union", but only by positing that: (1) an employee refraining from casting a written ballot must be counted as "a vote for

no representation", and (2) that the above presumption of the *Virginian Ry.* case—that employees who refrain from casting ballots are presumed to consent to the choice of the majority of those casting written ballots—*did not apply.* 380 U.S. at 670.

In the instant election, all parties agree that the largest group, 179, voted for no representation, 147 voted for the Teamsters and 74 for ALDA. This being the sole evidence of record as to employee preferences, there is as yet no basis for the Board's determination that the Teamsters, or any other choice, is desired by the majority of the craft or class. On the other hand, the Board's investigation *does* show that 253 (63%) of the employees have thus far chosen something *other* than the Teamsters.

The result of the Court of Appeals decision in sustaining the Board is that even where the sole evidence of record of employee preference consists of the above described vote count, it is nonetheless permissible for the Board to conclude—at that point—(1) that there is an organization desired by the majority of the craft and (2) that this organization is the Teamsters.

In order to achieve this result, the Court held that the Board reached a "permissible conclusion" under the Railway Labor Act in deciding "that since a majority of the employees obviously had voted for *some* representation, the union which became the choice of a majority of those thus voting should be certified". (*infra,* p. 4a). The Court cited no authority for its conclusion that *where every member of the craft has expressed his choice* the Act *still* permits the certification of a union which is only the choice of a majority of those voting for some union, rather than the majority

of the craft or class. This lack of cited authority is understandable since all significant precedent is to the contrary.

For example: (1) the Act unqualifiedly states that the "*majority of any craft or class* of employees shall have the right to determine *who* shall be the representative";* (2) the legislative history of the Act shows that the precise meaning of "majority" in Section 2, Fourth was discussed and was understood by Congress to mean the majority of the entire craft or class, not just of those who favored "some" union;** (3) this Court, in *Virginian Ry. Co.* v. *System Federation No. 40* treated the word "majority" in Section 2, Fourth as referring to a "majority *of those eligible to vote*",*** i.e., the majority of the *entire* craft or class; and (4) the United States Court of Appeals for the District of Columbia Circuit, in 1943, said that the purpose of the Railway Labor Act was to "furnish a procedure whereby the employees of a particular craft or class could attain a representation by *the organization* which the *majority* of the craft or class desired", *Switchmen's Union* v. *NMB,* 135 F. 2d 785, 796 (1943), *rev'd on other grounds,* 320 U.S. 297 (1943) (latter emphasis by the court).

Thus, the action of the Board, as sustained by the Court of Appeals, distorts the plain language and in-

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* Section 2, Fourth (emphasis added).

** Hearings on H.R. 7650 (and H.R. 9689), House Committee on Interstate and Foreign Commerce, 73rd Cong., 2d Sess. 35, 57. [Testimony of Commissioner Eastman, the draftsman of the Act].

*** 300 U.S. 515, 560 (1937) (emphasis added). As indicated at p. 7, *supra,* the Court fashioned a statutory majority by employing a "presumption"—a presumption which is concededly not available here.

tent of the Railway Labor Act, and expands the obligations which Congress placed upon employers. It does so by extending these duties so as to require the employer to bargain collectively when the majority of a craft or class has *not* yet selected a representative, and by specifically compelling bargaining with an organization which is the choice of less than a majority of the craft, and which, as the only evidence of record shows, has been opted against by 253 (63%) of the craft.

While, as shown above, the holding of the Court of Appeals rests on an erroneous view of the "majority" language of the statute, it should also be observed that the Court nevertheless does appear to offer an explanation as to how the Teamsters' 37% actual vote might be augmented into the required majority of the entire craft or class. The court states:

> "Even after taking account of the fact that failure to vote at all is to be treated as a vote for no representation and that the same is true of failure to cast a valid ballot, *it is clear that the Board was entitled to view the circumstances in light of the 'practicalities of voting the fact that many who favor some representation will not vote. . . .' Railway Clerks* v. *Employees Assn.*, 380 U.S. at 669 n. 5." *Infra,* p. 4a (emphasis added)

By thus taking a portion of a sentence out of an *obiter dictum* footnote in the *Railway Clerks* opinion of this Court, the Court of Appeals, despite protestations to the contrary, is clearly saying that a refusal to vote for representation is *not quite* a vote for no representation. Yet, by permitting use of a ballot without a no union box and at the same time permitting the Board to conjure up a "view" nullifying the rule that no vote is a vote for no representation, the Court

of Appeals' theory violates the conditions under which this Court permitted the NMB's unique ballot to be used (380 U.S. at 670). In short, if *this* is the Court of Appeals' basis for validating the Board's conclusion of the desires of the majority, then that court has revived the presumption, rejected by this Court in *Railway Clerks,* that a refusal to vote in an NMB election may be used to support unionization, notwithstanding the fact that the employee has no other way to vote against it.*

II.

The Railway Labor Act imposes an obligation on the Mediation Board to conduct an investigation to determine who, if anyone, is desired by the majority of the craft or class as bargaining representative. The qualitative standards for the Board's duty to investigate stem from both the Act and the Constitution. The Act (Section 2, Ninth) imposes on the Board a "duty to make such an investigation as the nature of the case requires." *Railway Clerks* v. *Employees Association,* 380 U.S. 650, 662 (1965). Constitutional considera-

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* The Board's predisposition to continue to accord less weight to a vote for "no union" than "for" a union is reflected in its refusal in this case to employ its established procedures for run-off elections. 29 C. F. R. § 1206.1. Under these regulations, if the 179 votes here cast for "no union" had been cast for a *third* union instead, its own rules show that the Board would *not* have considered the election an adequate basis for certifying *even the union which received the highest number (179) of votes.*

Yet in the instant case, simply because the highest number of votes were cast for "no union", they are ignored, and the Board concluded, without further investigation, that even the choice receiving the second highest number of votes (147) is the choice of the majority. In this manner, the Board still accords more weight to a vote "for" a union than to a vote for "no union".

tions require that the resulting determination of who shall be the representative "must be the result of a process of reasoning." *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 136 (1951).*

Having failed to develop the facts from which it can rationally determine what the statute requires it to determine, the Board has not conducted an "investigation such as the nature of the case requires" and has thus failed to perform its duty under the Act. Having made the determination in the absence of the requisite facts, it has impinged on the Constitutional standard.

As a result of the Board's action, the petitioner will be burdened with obligations not authorized by law. Under such circumstances, relief has traditionally been available in the federal courts, *e.g., Harmon* v. *Brucker,* 355 U.S. 579, 581-82 (1958), and it has been consistently indicated that it would be available even if the offending agency were the National Mediation Board. *See, e.g., Railway Clerks* v. *Employees Association,* 380 U.S. 650, 669, 671 (1965) (Indicating jurisdiction to review action in excess of statutory authority, 380 U.S. at 669, 671; or for failure to perform statutory duty to investigate under Section 2, Ninth, *Id.,* at 661, 665.).

The refusal of the lower courts to assert jurisdiction in the circumstances of this case is not only in error but seriously impairs the essential doctrine of afford-

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* This Court there described the limits of a governmental determination as follows:

"An 'appropriate' governmental 'determination' must be the result of a process of reasoning. It cannot be an arbitrary fiat contrary to known facts. This is inherent in the meaning of 'determination'. It is implicit in a government of laws and not of men." 341 U.S. at 136.

ing judicial relief to parties aggrieved by unauthorized government action.

IV.

The District Court having exercised its discretion and refused to issue a mandatory injunction against petitioner, will now be forced, under the judgment of the Court of Appeals, to issue its most extraordinary equitable remedy to compel petitioner to bargain (1) when the majority of the craft or class has yet to designate a representative and (2) with a representative thus far rejected by 63% of the craft.

The former is not authorized by the Act (*Virginian Ry. Co.* v. *System Federation No. 40,* 300 U.S. 515, 548 n. 6), and the latter contravenes what this Court has noted as one of the Act's primary objectives, i.e., the "preventing [of] such bargaining with any who do not represent" the majority. *Id.* at 548.

Determination of what a court of equity may or may not consider when asked to enforce an NMB certification under these circumstances is a matter of signal importance to the administration of the Act—as well as to the role of the federal judiciary when asked to implement and enforce administrative determinations.

That question was expressly left open by this Court in *Switchmen's Union* v. *National Mediation Board,* 320 U.S. 297, 307 (1943), when it stated:

> "What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us."

That question is now presented by this case and should be answered.

CONCLUSION

In the 1965 *Railway Clerks* case, the National Mediation Board urged that the time was not then ripe for this Court to consider the "majority choice" issues under the Act now presented by *this* case. The Board said:

> "4. Since no election has been held in this case, the Board has drawn no conclusions from the balloting. The Courts may not interfere with a representation election on the ground the circumstances *may* develop later in which the Board *may* draw conclusions from the balloting which *may* lead to the certification of a representative which *may* not be the majority choice." (emphasis in original)*

We respectfully submit that the questions which the Mediation Board urged the Court in that case not to consider, and which indeed were not answered, are now properly before this Court for its consideration.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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* Reply Brief of National Mediation Board and its members, p. 6, Nos. 138, 139, and 369, O.T. 1964, *Railway Clerks* v. *Employees Association*, 380 U.S. 650 (1965).

APPENDIX